

STATE OF MARYLAND

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IN THE

*

CIRCUIT COURT

v.

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FOR

MICHAEL JOHNSON

*

BALTIMORE CITY

CASE NO.: 112116013

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**STATE'S MOTION TO CLOSE THE COURTROOM DURING THE SHOWING OF
SEXUALLY EXPLICIT VIDEO INVOLVING A MINOR, AND TO SEAL THE VIDEO
AFTER IT IS ADMITTED INTO EVIDENCE**

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Now comes Gregg L. Bernstein, State's Attorney for Baltimore City, and Tonya LaPolla Assistant's State Attorney, and hereby moves this Honorable Court to close the courtroom to the public during the display of specific sexually explicit evidence, and to keep such evidence sealed after the close of the case.

INTRODUCTION

In the case of *State v. Michael Johnson*, the Office of the State's Attorney for Baltimore City wishes to close the courtroom to the general public during a portion of the testimony from the victim's sister, Deena Barnes, in which the State will introduce a sexually explicit video recorded on the phone of Ms. Barnes, that depicts the minor victim along with three individuals, another of whom was a minor, engaging in sexual relations. The State also moves to keep this video sealed after the conclusion of the case for the same reasons outlined below.

CASE LAW

The Sixth Amendment of the Constitution provides that in "all criminal prosecutions, the accused shall enjoy the right to a... public trial." U.S. CONST. AMEND. VI. The reasoning behind this right is to "guarantee fairness, the appearance of fairness, and public confidence in the

criminal justice system.” *Longus v. State*, 416 Md. 433, 445 (2010). However, the right to a public trial is not absolute. *Carter v. State*, 356 Md. 207, 216 (1999).

In order to rebut the presumption one has towards the right to a public trial, the state must show an “overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 509 (1984). The interest is to be well articulated, along with findings specific so that that a reviewing court can determine whether the closure order has been properly entered. 464 U.S. at 509. Furthermore, the trial court must also consider any reasonable alternatives to closing the proceedings. *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

In *Waller v. Georgia*, the Supreme Court explained that “[a] party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; the closure must be no broader than necessary to protect that interest; the trial court must consider reasonable alternatives to closing the hearing; and it must make findings adequate to support the closure”. *Id.* at 40. Statutes allowing the general closure of a courtroom for cases involving minor-sexual-assault-victims are in violation of the Sixth Amendment. *See generally Globe Newspaper Co.*, 457 U.S. 596, 607 (2000). In *Globe Newspaper Co.*, the Court explained that a closure need be necessitated “by a compelling governmental interest and...narrowly tailored to serve that interest.” *Id.* at 596. In the case of *Globe Newspaper Co.*, the overall closure of the courtroom was not “narrowly tailored”. *Id.*

Recently, the Maryland Court of Special Appeals has weighed upon the legitimacy of narrow measures. *Kelly v. State*, 195 Md.App. 403 (2010). In *Kelly v. State*, the Court explains that some closures are so *de minimus* or trivial, that they do not violate a defendant’s Sixth

Amendment rights. *Id.* However, the Court explains that “the length of the closure, the significance of the proceedings that took place while the courtroom was closed, and the scope of the closure, i.e., whether it was a total or partial closure,” should be assessed. *Kelly*, 195 Md.App. at 421-422. Additionally, while only persuasive, many courts view a closure of less than an hour as *de minimus*.¹

STATE’S ARGUMENT

In the case of *State v. Michael Johnson*, the Office of the State’s Attorney moves to close the courtroom to the general public for a portion of the testimony of Deena Barnes. Specifically, this office wishes only to close the courtroom for approximately sixteen minutes and thirty one seconds, the amount of time in which the State will present a video that was recorded and stored on the phone of Deena Barnes, depicting the minor Victim (Phylicia Barnes), the Victim’s sister (Deena Barnes), the Defendant (Michael Johnson), and the Defendant’s minor brother ([REDACTED]), intoxicated and engaging in sexual relations. The State does not wish to maintain the closure of the courtroom for questions asked to Deena Barnes subsequent to the video.

In chronicling the State’s argumentative compliance with the *Kelly* requirements as listed above - length of closure, significance of the proceedings, and scope of the closure – the rationality of the State is twofold. *Kelly*, 195 Md.App. at 421-422. Most generally, the State believes that there are no benefits provided to the general public from watching child pornography. Additionally, the State offers that the narrow timeframe in which the courtroom

¹ See *Peterson v. Williams*, 85 F.3d 39, 41-42, 44 (1996) (holding that a 20 minute closure while defendant testified was “extremely short” and “too trivial” to constitute Sixth Amendment violation); *United States v. Al-Smadi*, 15 F.3d 153, 154–55 (10th Cir.1994) (rejecting public trial violation, in part, because 20 minute closure was “brief”); *People v. Bui*, 183 Cal.App.4th 675, 686–87, 689 (Cal.Ct.App 2010) (explaining that the exclusion of three people for 40 minutes during voir dire was de minimis, and did not violate defendant’s constitutional right to a public trial).

will be closed to show this video is outweighed by the potential harm to the surviving minor in the video, the victim's family, and society as a whole.

The Supreme Court has previously held that a state's interest in safeguarding the physical and psychological wellbeing of a minor is a compelling governmental interest. *See generally* *New York v. Ferber*, 458 U.S. 747 (1982). Children involved in child pornography are harmed, according to court, because the sexual recordings produce permanent records and the harm to the child is exacerbated by circulation of the material. *Id.* Unlike obscene material, the mere possession of child pornography is illegal. *Osborne v. Ohio*, 495 U.S. 103 (1990).

Here, the State argues that the three *Kelly* factors lean towards favoring a short courtroom closure. *Kelly*, 195 Md.App. at 421-422. Under the "length of closure" evaluation, the State contends that a closure for only sixteen minutes and thirty one seconds is reasonable and doesn't impact the Defendant's 6th Amendment right to a public trial. Specifically, the State requests the reopening of the courtroom for any and all questioning after the video is shown.

Second, under *Kelly's* "significance of the proceedings" prong, the State contends that the video will be used merely to portray relationships between parties. Given this circumstantial nature, the showing of child pornography to a crowded courtroom, including various members of the media, is equitable to "circulation" – the protection of which is a compelling government interest – as referenced in *New York v. Ferber*. *Ferber*, at 749. Put baldly, there is little significance to the showing the video when such rubs against a compelling government interest.

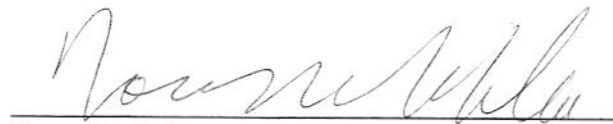
Lastly, under the "scope of closure" evaluation, the State contends that a full closure is required given the sensitive nature of the video as it would be under inclusive for the Court to handpick those who had significant standing to watch the video, and those who did not.

For the same reasons that the State requests this brief courtroom closure, it is also moves to seal the video at the conclusion of the case for the benefit of the surviving minor, as well as those associated with the Victim and the Defendant.

WHEREFORE, for the reasons provided above, the State requests that this Honorable Court grant the State's motion to close the courtroom for the showing of the video, and to keep the video sealed when in evidence.

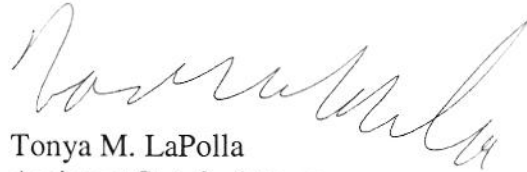
Respectfully submitted,

Gregg L. Bernstein

A handwritten signature in dark ink, appearing to read 'Tonya LaPolla', is written over a horizontal line.

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I DO HEREBY CERTIFY that the above motion was this 21st day of December, 2012, hand-delivered to the defense attorney, Russell A. Neverdon, Esq. at 201 North Charles Street, Suite 1900 Baltimore, MD 21201.

A handwritten signature in cursive script, appearing to read 'Tonya M. LaPolla', written in dark ink.

Tonya M. LaPolla
Assistant State's Attorney